Supreme Court, U.S.
FILED

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NO.

In The Supreme Court of The United States

ZVI GUTTMAN

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the virtually insurmountable high standard for establishing municipal liability under 42 U.S.C. § 1983 for a violation of the Constitution of the United States unfairly denies justice to victims of such violations.

2. Whether the Maryland Court of Special Appeals erred[1] when it concluded that the plaintiff failed to establish municipal liability on the part of the Mayor and City Council of Baltimore for terminating the auto body repair contract of Deborah Mullins for making constitutionally protected comments about Baltimore City auto body repair practices in television newscasts even though a majority of the members of the Maryland Board of the Estimates had circumstantial knowledge of the action being taken against Deborah Mullins through the actions of their assistants.

3. Whether the Court of Special Appeals erred when it concluded that Edward J. Gallagher, the City Purchasing Agent who terminated the Mullins auto body repair contract after Deborah Mullins appeared in television newscasts criticizing Baltimore City auto body repair practices, was not a policy maker sufficient to establish liability on the part of the municipality.

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[1] The Maryland Court of Appeals, Maryland's highest appellate court, denied the plaintiff's Petition for a Writ of Certiorari on June 11, 2010.

4. Whether the Maryland Court of Special Appeals erred when it concluded that it was not necessary to consider the plaintiff's petition for attorney fees because the jury verdict was reversed in part.

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OPINIONS BELOW

The opinion of the Maryland Court of Special Appeals, No. 2122, September Term, 2008, filed on February 2, 2010, is unreported and is appended in the Appendix to the Petition ("Pet. App.") at A-2.

JURISDICTION

Petitioner filed a timely Petition for a Writ of Certiorari with the Maryland Court of Appeals, but it was denied on June 11, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the provisions of 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. The pertinent provision is reproduced in the Appendix at Pet. App. A-27.

STATEMENT OF THE CASE

A. Factual Background

1. Auto Repair Contract Awarded to Deborah Mullins by Baltimore City.

On December 12, 2001, Baltimore City awarded Deborah Mullins, sole operator and owner of Competitive Body and Paint (CBP), contract BP02055 (City contract) granting her the right, together with several other vendors of auto body repair services, to bid on auto body repair work required by Baltimore City.

The contract was administered by, Edward J. Gallagher, the Baltimore City Purchasing Agent, and was under the supervision and direction of the Baltimore Department of Public Works.

The contract was awarded by the Baltimore Board of Estimates which is charged with issuing Baltimore City contracts. The Board of Estimates is composed of the Mayor, the Director of the Department of Public Works, the City Solicitor, the Comptroller and the City Council President.

At the time that the contract was awarded to Deborah Mullins, her husband, Jimmy Mullins, worked in Baltimore City's body shop as a body repair man. He did not have any financial interest in Ms. Mullins body shop. Further, Jimmy Mullins was not involved in any part of selecting and sending auto body work to Ms. Mullins, or the inspection or approval of work by the body shops.

At trial, Ms. Mullins testified that she made the City Purchasing Agent aware that Jimmy Mullins worked in the body shop. Further, this was common knowledge in the City's body shop.

(2) Deborah Mullins' Appearance on Fox 45 Criticizing Baltimore City Auto Body Repair Practices

Deborah Mullins appeared in newscasts on January 14, 2004,and February 19, 2004, at the request of Fox45 wherein she stated that Baltimore City repair practices resulted in substandard and unsafe repairs.

(3) Action Taken by Baltimore City Officials Right after Ms. Mullins' First Television Appearance

Unbeknownst to Deborah Mullins, on January 16, 2004, Leslie Winner, the Chief Solicitor for Baltimore City, sent an email to Donald Huskey, Deputy Solicitor, and George Winfield, Director of Public Works, confirming a conversation she had with George Winfield about a "fleet vending contract and related issues." At trial, Ms. Winner confirmed that the "vendor" referred to in the memo was Deborah Mullins t/a Competitive Body and Paint.

(4) Baltimore City Officials Memorandum Exploring Options for Termination the Mullins Contract Shortly after Deborah Mullins Television Appearance

Pursuant to the January 16, 2010 email, on February 4, 2004, Leslie Winner, Baltimore City's Chief Solicitor, prepared a memorandum (Winner

memo), addressed to Deputy Mayor Michael Enright, with copies to Thurman W. Zollicoffer, Jr., the City Solicitor; Donald Huskey, Deputy Solicitor; George Winfield, Director of Public Works; J. Keith Scroggins, Head of the Bureau of General Services for the Department of Public Works;[1] Matt Gallagher, Director of the Mayor's City Stat Office; and defendant Edward J. Gallagher.

> The preamble to the memorandum stated: George Winfield, Director of the Department of Public Works, and Donald Huskey, Deputy Solicitor, requested that I look into the award of the above-captioned contract to Competitive Body and Paint ("CBP"), one of the vendors. I was also asked to look at the quality of the work being performed by the said vendor, the relationship of the said vendor and a city employee and the possible debarment of the vendor.
>
> ***
>
> While it might be possible to eventually debar CBP from City contracts, it might be easier and more politically palatable to proceed in another manner. (Emphasis added.)

On page 7 of the memo, Leslie Winner stated:

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[1] J. Keith Scroggins was an immediate subordinate of George Winfield, Director of Public Works.

CBP is one of the nine vendors to be awarded this "requirements" contract for automotive body repair services. It appears that Deborah Mullins, the owner (president?) of CBP is married to Jimmy Mullins, an employee in the Central Garage body shop.

Were the relationships between and among the parties disclosed prior to award of the contract? This does not appear to be the case, although everyone seems to know about these relationships at this point in time.

On page 8 of the memo, Leslie Winner stated:

> Much of what has been said about Deborah Mullins (or Jimmy Mullins) and the award of this contract has not been verified to a legal certainty. Therefore if one wished to debar this company from doing business with the City, **a full investigation must be launched.** (Emphasis added.)
>
> ****
>
> As an alternative, this contract could be terminated as to this vendor for either cause or at the convenience of the City. If the City Purchasing Agent wishes to terminate for cause, he must present proof of the default, *i.e.*, inferior work, use of inferior materials, failure to perform in a timely manner, etc. The City Purchasing Agent could also show that Jimmy Mullins failed to notify the City of a Conflict of Interest.

> The easiest course to terminate this contract would be for the City Purchasing Agent to terminate for the convenience of the City. This could be done at any time and would not result in the same political fallout as the other modes of termination (or debarment).(Emphasis added).

Leslie Winner testified that in conducting her investigation, she did not speak with Deborah Mullins or Jimmy Mullins about the alleged conflict of interest.

What should strike any reader of the memorandum is the glaring omission of any clear justification for investigating the Mullins contract. Nor is there any clear explanation why the conflict of interest issue arose three (3) years after the contract was awarded.

(5) Termination of the Mullins Contract

On March 29, 2004, Edward J. Gallagher, the City's Purchasing Agent, wrote Deborah Mullins a letter stating that on March 24, 2004, the Board of Estimates had terminated the Mullins contract.

After discovering that her contract was terminated, Deborah Mullins telephoned the City's Purchasing Department about the termination and was referred to Joseph Mazza, who identified himself as an attorney. In reality, Joseph Mazza was an assistant to defendant Gallagher, and who

was in charge when defendant Gallagher was unavailable.

Joseph Mazza advised Deborah Mullins that part of the reason for the termination was her appearance on Fox 45.[2]

When asked, at trial, about the reason for terminating the Mullins contract, defendant Edward J. Gallagher stated:

> An issue of conflict of interest had arisen and **counsel in the law department** researched that issue and **determined that there was a conflict** of interest or certainly a perception of the conflict of interest. And based upon that reason I proceeded to terminate Deborah Mullins' contract. (Emphasis added).

Defendant Edward J. Gallagher confirmed that the document he relied on was the Winner memorandum of February 4, 2004. And that the conflict of interest, described in the Winner memorandum, was the sole reason for the termination.

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[2] Joseph Mazza recalls having several telephone conversations with Deborah Mullins and does not have a clear recollection of them, but he denies having advised Deborah Mullins that her termination was motivated by her appearance on Fox 45.

At trial defendant Edward J. Gallagher admitted that he did not speak to Deborah Mullins or Jimmy Mullins about the conflict of interest issue after he reviewed the Winner memo, that he did not know what Jimmy Mullins actually did in Central Garage, nor did he conduct any further investigations before terminating the Mullins contract, because he relied upon the work of Baltimore City Chief Solicitor, Leslie Winner.

B. Proceedings Below

On, or about December 10, 2004, Deborah Mullins filed suit against Mayor & City Council of Baltimore (sometimes referred to as "Baltimore City" or "City"), Edward J. Gallagher, Baltimore City's Purchasing Agent, and Robert Gibson,[3] alleging *inter alia* that Baltimore City terminated her contract to bid on auto body repairs in retaliation for her criticism of Baltimore City auto body repair practices in appearances on Fox 45 on January 14, 2004, and on February 19, 2004.

The case is now brought in the name of Zvi Guttman, Trustee in Bankruptcy, because approximately eight months after her contract with the city was terminated, Deborah Mullins filed a petition under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District

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[3] The claims against Robert Gibson were dismissed prior to trial.

of Maryland. Zvi Guttman (sometimes referred to as "the Trustee") was appointed trustee for the plaintiff's bankruptcy estate.

On April 19, 2006 the Circuit Court of Maryland for Baltimore City granted defendants' motion for summary judgment on the basis that the criticism of Baltimore City auto body repair practices by Deborah Mullins was not protected speech.

The summary judgment in favor of defendants Baltimore City and Edward J. Gallagher was reversed by the Maryland Court of Special Appeals, Case No.: 10695, September Term, 2006, on October 19, 2007, and remanded the case for trial.

On August 8, 2008 the Circuit Court for Baltimore City dismissed all claims against Edward J. Gallagher on the basis of legislative immunity.

This case was tried on August 27, 2008 in the Circuit Court for Baltimore City, *Guttman v. Mayor and City Council of Baltimore*, Case No.: 24-C-04-008936, and a jury entered a verdict in the plaintiff's favor against the defendant Mayor and City Council in the amount of $120,000.00 for the violation of Deborah Mullins' rights under the First Amendment.

Defendant Mayor and City Council of Baltimore appealed the verdict to the Court of Special Appeals, Case No. 2122, September Term, 2008. The plaintiff Cross-appealed the Circuit Court's pre-trial

dismissal of the action against defendant Edward J. Gallagher.

On February 2, 2010, the Court of Special Appeals reversed the jury verdict against the Mayor and City Council of Baltimore concluding that the plaintiff failed "to show that a majority of the members of the Board [of Estimates] had knowledge of her speech, that Edward J. Gallagher was not a "policy maker" so as to establish municipal liability. The court, however, concluded that Edward J. Gallagher was not entitled to legislative immunity, reversed the dismissal of the action against him and remanded the case to the Circuit Court for trial on the merits against Edward J. Gallagher.

Petitioner filed a timely Petition for a Writ of Certiorari to the Maryland Court of Appeals and Respondent Edward J. Gallagher filed a cross-petition. Both petitions were denied on June 11, 2010.

C. Federal Question Raised.

This action is based upon 42 U.S.C. § 1983 for the violation of Deborah Mullins' rights under the First Amendment to the U.S. Constitution. This was stated in plaintiff' Amended Complaint and was asserted at every stage of the proceedings. The opinion of the Maryland Court of Special Appeals is based upon the plaintiff's claim that her rights under the First Amendment to the U.S. Constitution were violated, (Pet. App. A-2). Plaintiff filed a

Petition for a Writ of Certiorari to the Maryland Court of Appeals which clearly raises the issue of municipal liability for the violation of First Amendment rights. (Pet. App. A-1)

REASONS FOR GRANTING THE PETITION

1. This is an important case because it addresses the rights of a citizen to criticize the citizen's government without fear of retribution. While the government criticism in this case takes place in the context of a contract with Baltimore City, such speech is, protected by the First Amendment to the United States Constitution because it addresses a matter of substantial public interest.

2. The freedom to express honest criticism of government under the First Amendment is not possible when the rules for establishing municipal liability make it difficult to vindicate rights granted by the First Amendment. Many courts have concluded that the current state of the law makes it almost impossible to impose municipal liability when constitutionally protected conduct is a "motivating factor" in a municipality's action.

3. The current high standard for establishing municipal liability is not a deterrent because make it easy for government officials to violate a citizen's constitutional rights with impunity under the fiction that they are not final "policy makers," making it

almost impossible to hold municipal government liable for unconstitutional action.

4. This is an important case because it addresses a constitutional right which is exercised every day by persons dealing with governmental entities.

D. **Argument.**

The Evidentiary Burden Imposed by *Monell*, and its Progeny Make it Difficult to Establish Municipal Liability.

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978), established that cities were among the "persons" who could be sued under § 1983 for constitutional torts. The *Monell* doctrine, as it now stands, has replaced respondeat superior with four distinct theories under which cities can be held liable: liability based on formal policy, liability based on governmental custom, liability based on inadequate training or supervision, and liability based on improper hiring. David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, Ford. L. R. 2187-8.

The standards for imposing liability under § 1983 after *Monell* is higher than the ordinary standard for private employer liability, and higher than the standard for awarding punitive damages against private employers, Id., at 2191, even though

punitive damages are not available against municipalities. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

The result is that this standard is just too high to be of any value for deterring government officials from interfering and, as here, retaliating when citizens exercise their constitutional rights.

The current state of the law misreads the original Congress' intent as to the standard for establishing liability. Justice Stevens was of the opinion that the Forty Second Congress' rejection of the Sherman Amendment[4] demonstrated that Congress did not want to reject respondeat superior liability. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 834, (1985) (Stevens, J., dissenting). Professor David Jacks Achtenberg, contends that the Forty-Second Congress's rejection of the Sherman Amendment was not merely consistent with the nineteenth century rationales for respondeat superior, but was compelled by those rationales. David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, Ford. L. R. 2203.

Further, the standard for holding municipalities liable is overly complex. This was recognized in the

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[4] The Sherman Amendment would have held municipalities responsible for damage to person or property caused by private persons "riotously and tumultuously assembled." Cong. Globe, 42d Cong., 1st Sess., 749 (1871).

dissent filed by Justices Souter, joined by Justice Stevens and Breyer, in *Bd. Of County Comm'rs v. Brown*, 520 U.S. 397, 430-37 (1997):[5]

> I believe that the legal prerequisites for reexamination of an interpretation of an important statute are present here. The soundness of the original principle is doubtful. The original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply. Factual and legal changes have divorced the law from the distinction's apparent original purposes. And there may be only a handful of individuals or groups that have significantly relied upon perpetuation of the original distinction. If all this is so, later law has made the original distinction, not simply wrong, but obsolete and a potential source of confusion.

This case is just an example of the unreasonable difficulty for establishing liability for surreptitious government action, the sole purpose of which, is to retaliate for protected speech.

Eyewitness testimony is seldom available in discrimination cases *United States Postal Bd. of Governors v. Aikens*, 460 U.S. 711, 716-17, 103 S.Ct.

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[5] While that case was in the context of an "excessive force" case, the argument for simplification is equally important here

1478, 75 L.Ed.2d 403 (1983). See also, *United States v. City of Birmingham,* 727 F.2d 560, 564-65 (6th Cir. 1984), cert. denied, 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984).

In a recent case involving racial motivation of public officials in withdrawing support for a low-income housing project, *Smith v. Town of Clarkton,* 682 F.2d 1055, 1064-1065 (4th Cir. 1982), the Fourth Circuit wrote:

> Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this. The trial court, in making findings of fact, was faced with the same problems confronting trial courts everywhere sitting as finders of fact in cases involving racial discrimination.

E. The Maryland Court of Appeals Erred When it Concluded That There Was Insufficient Evidence to Support Municipal Liability.

The Board of Estimates is composed of the Director of Public Works, the Mayor, the City Solicitor, President of the City Council, and the City Comptroller. An email from Leslie Winner's January 16, 2004, the City Chief Contract Administrator in the City Solicitor's Office, and the subsequent February 4, 2004 memo produced by her, clearly document the involvement of three members of the Board of Estimates: George Winfield, the Director of Public Works, Thurman W. Zollicofer, Jr., the City Solicitor together with, and through, his deputy, Donald Huskey, and the Mayor's office, through the Mayor's deputy, Michael Enright, the Deputy Mayor.

The actions of the members of the Board of Estimates in initiating and thereafter ratifying Edward Gallagher's termination of the Mullins contract provide sufficient circumstantial evidence to support the court's conclusion that the actions of the Board of Estimates constituted municipal policy.

Defendants failed to produce any other legitimate documentation, predating the Fox 45 newscast, to support the termination of the Mullins contract.

The temporal proximity of the January 16, 2004 email, followed by the Winner memorandum of

February 4, 2004 constitutes circumstantial evidence of the involvement of at least three of the five members of the Board of Estimates. While the memorandum was addressed to the Deputy Mayor and the Deputy Solicitor, these officials are sufficiently highly placed to impute knowledge of the memorandum to the principals.

F. **Edward J. Gallagher Was Clearly a Policy Maker, Appointed by the Board of Estimates with Broad Discretionary Powers to Administer and Terminate Contracts Awarded by the Board of Estimates.**

A further reason for upholding the jury verdict is that there was sufficient evidence to support the conclusion that defendant Edward J. Gallagher was given the discretion, by the Board of Estimates, to terminate the Mullins contract.

Edward J. Gallagher testified that he had the authority to terminate the Mullins contract and that he proceeded to terminate the Mullins contract because a conflict of interest brought to his attention by the City's Law Department, in the Winner memorandum of February 4, 2004.

That defendant Gallagher, the City Purchasing Agent, had the authority to terminate the Mullins contract is recognized by Leslie Winner, Baltimore City's Chief Solicitor in her February 4, 2004 memo:

> The easiest course to terminate this [Mullins] contract would be for the City Purchasing Agent to terminate it for the convenience of the City.

In *Pembaur v. City of Cincinnati, et al.*, 475 U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)[6], the U.S. Supreme Court recognized that official policy could take place outside of lawmaking bodies and did not have to involve rules of general applicability. Rather, policy could be made by those individuals whose edicts or acts may fairly be said to represent official policy.

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[6] In *Pembaur*, a county prosecutor told local law enforcement officials to "go in and get" two individuals who were inside a medical clinic and resisting service of an arrest warrant. Proceeding on the prosecutor's instructions, the sheriff and various city police officers broke in and arrested two individuals who, it so happened, were not the persons whom the warrant named. The owner of the clinic, a doctor, then sued under § 1983 for damages arising from what he alleged was an unlawful search and seizure of his premises. He named various individual defendants as well as the county, arguing that a search warrant was needed before police could enter the doctor's offices to serve the arrest warrant.

Although the events were singular in the sense that they occurred on a one-shot basis, and although no law or customary practice of the county seemed to sanction the particular search, the Supreme Court concluded that the county could be liable under *Monell*. The county prosecutor, said a plurality of the Court, had been delegated the "final policymaking authority" to make such searches, and "municipal liability may be imposed for a single decision by municipal policymakers.

This is so because the authority to terminate the Mullins contract is clearly spelled out in Paragraph XXIX. C. of the Mullins contract:

> The performance of work under this contract may be terminated by the City in accordance with this clause in whole, or in part, **whenever the City Purchasing Agent shall determine that such termination is in the best interest of the City**. Any such termination shall be effected by mailing to the Offeror of a Notice of Termination specifying the extent to and conditions under which performance of work under the contract is terminated and the date upon which such termination becomes effective. (Emphasis added).

G. The Circuit Court Erred When it Denied the Plaintiff's Petition for Attorney Fees.

In the event that the Petition for a Writ of Certiorari is granted, the plaintiff further requests that the court examine the denial of the plaintiff's petition for attorney fees by the trial court.

H. Conclusion.

The current standard for establishing municipal liability is too high and unnecessarily complex.

Petitioner requests that the Court grant the Writ of Certiorari to examine and review the current standard with a view to making it easier for legitimately aggrieved persons to hold municipal officials responsible for their actions. A lower standard for establishing such liability will act as an effective deterrent to keep municipal officials from engaging in actions which is unconstitutional.

Alternatively, petitioner requests that the Court reverse the decision of the Maryland Court of Special Appeals and reinstate the judgment which was awarded to the petitioner by the jury in the Circuit Court of Maryland for Baltimore City.

Wherefore, petitioner respectfully requests that the Court grant the petitioner's petition and issue Writ of Certiorari to the Maryland Court of Special Appeals of Maryland for the purpose of reviewing the decision of the Court of Special Appeals, and for such other and further relief, as may be appropriate.

Respectfully submitted,

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ZVI GUTTMAN, Trustee	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.		
	*	Petition Docket No. 33 September Term, 2010
MAYOR AND CITY COUNCIL OF BALTIMORE	*	
	*	(No. 2122, Sept. Term, 2008 Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the answer and conditional cross-petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: June 11, 2010

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2122
September Term, 2008

ON MOTION FOR RECONSIDERATION

MAYOR AND CITY COUNCIL OF
BALTIMORE
V.
ZVI GUTTMAN, Trustee

Zarnoch,
Matricciani,
Kehoe,
JJ.

Opinion by Matricciani, J.

Filed: February 2, 2010

Appellants/cross-appellees Mayor and City Council of Baltimore (collectively "the City"), challenge the entry of judgment by the Circuit Court

for Baltimore City after a jury verdict in favor of appellee/cross-appellant Zvi Guttman, trustee in bankruptcy for Ms. Deborah Mullins ("Ms. Mullins"), who brought a 42 U.S.C. § 1983 claim against the City alleging that she was fired for engaging in protected speech. The appellants present four issues for our consideration, which we have rephrased:

I. Whether an official policy or custom of the City of Baltimore caused the termination of Ms. Mullins' contract.

II. Whether there was sufficient evidence to support the jury's verdict.

III. Whether the City is entitled to judgment because the jury found that the City had grounds to terminate Ms. Mullins' contract regardless of her protected speech.

IV. Whether the trial court erred by failing to give the jury instructions requested by the city.

Ms. Mullins cross-appeal injects two further issues:

I. Whether the trial court erred by granting summary judgment in favor of Edward J. Gallagher ("Mr. Gallagher") because he is not entitled to legislative or qualified immunity.

II. Whether the court's denial of Ms. Mullins' petition for attorney fees is an abuse of discretion.

We reverse the court's judgment because of the lack of evidence that an official policy of the City caused the termination of Ms. Mullins' contract and remand for entry of judgment in favor of the City. We reverse the court's grant of summary judgment in favor of Mr. Gallagher for the reasons explained below and remand to the trial court for further proceedings in accordance with the principles enunciated in this opinion.

FACTS

On December 12, 2001, the City awarded Ms. Mullins' company, Competitive Body and Paint, contract BP02055, which entitled her to bid on auto body repairs required by Baltimore City. On a weekly basis, multiple vendors would place bids on vehicles that the City wanted repaired and generally the lowest bidder would get the work.

At the time Ms. Mullins applied for the contract, her husband, Jimmy Mullins, worked in Baltimore City's central garage as a body man. Mr. Mullins did not work for Ms. Mullins' company at the time the contract was awarded. Prior to bidding on the contract, Ms. Mullins spoke to Arthur McNeal, the city purchasing agent at that time, and advised him that her husband worked in the central

garage. Ms. Mullins then wrote to Avery Aisenstark, director of the board of ethics of Baltimore City, requesting an opinion concerning whether her husband's employment should prevent her from bidding on the contract. On March 30, 2001, Mr. Aisenstark wrote a letter advising her that she could bid on the contract as long as her husband "disqualif[ied] and recuse[d] himself from any participation in the consideration, award, or implementation of that contract."[1]

Mr. Mullin's supervisor, James Wilburn, testified that he and the Purchasing Department made all decisions regarding who was awarded auto body repair work and that he was aware that Mr. Mullins was married to Ms. Mullins. Mr. Wilburn also testified that Mr. Mullins did not get involved in the selection of cars sent out to auto repair vendors and did not inspect cars that were repaired by these vendors.

On January 14, 2004 and February 19, 2004, Ms. Mullins appeared on Fox 45 newscasts and criticized Baltimore City repair practices[2] . On

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[1] Appellant contends that Ms. Mullins misled Mr. Aisenstark by advising him that she and her husband were separated at the time.

[2] We will not address the content of the newscasts or Ms. Mullins' statements because we addressed this issue in *Guttman v. Mayor and City Council of Baltimore*, No. 1695, Sept. Term 2006 (filed October 19, 2007) ("Guttman I"), where

January 16, 2004, Leslie Winner, the Chief Solicitor for Baltimore City, sent an email to Donald Huskey, Deputy Solicitor, and George Winfield, Director of Public Works, to confirm that she had spoken with Mr. Winfield regarding a "fleet vending contract and related issues." Ms. Winner testified at trial that the "vendor" referred to in the email was Ms. Mullins.

On February 4, 2004, Ms. Winner prepared a memorandum, addressed to Deputy Mayor Michael Enright, with copies to Thurman W. Zollicoffer, Jr., the City Solicitor; Donald Huskey, Deputy Solicitor; George Winfield, Director of Public Works; J. Keith Scroggins, Head of the Bureau of General Services for the Department of Public Works; Matt Gallagher, Director of the mayor's City Stat Office; and Edward J. Gallagher, the City's Purchasing Agent. Ms. Winner stated in the introduction to the memo:

> George Winfield, Director of the Department of Public Works, and Donald Huskey, Deputy Solicitor, requested that I look into the award of the above-captioned contract to Competitive Body and Paint ("CBP"), one of the vendors. I was also asked to look at the

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we held that her speech related to a matter of public concern and did not relate to her employment contract with the City, and thus the motions court erred in granting summary judgment in favor of the City. We remanded to the Circuit Court for Baltimore City, whose ruling is the subject of the instant appeal.

> quality of the work being performed by the said vendor, the relationship of the said vendor and a city employee and the possible debarment of the vendor.
>
> * * *
>
> While it might be possible to eventually debar CBP from City contracts, it might be easier and more politically palatable to proceed in another manner.

Regarding a potential conflict of interest for Ms. Mullins, Ms. Winner stated in the memo:

> Were the relationships between and among the parties disclosed prior to award of the contract? This does not appear to be the case, although everyone seems to know about these relationships at this point in time.

Finally, Ms. Winner addressed the possible debarment of Ms. Mullins:

> Much of what has been said about Deborah Mullins (or Jimmy Mullins) and the award of this contract has not been verified to a legal certainty. Therefore if

> one wished to debar this company from doing business with the City, a full investigation must be launched.
>
> As an alternative, this contract could be terminated as to this vendor for either cause or at the convenience of the City. If the City Purchasing Agent wishes to terminate for cause, he must present proof of the default, *i.e.*, inferior work, use of inferior materials, failure to perform in a timely manner, etc. The City Purchasing Agent could also show that Jimmy Mullins failed to notify the City of a Conflict of Interest.

The easiest course to terminate this contract would be for the City Purchasing Agent to terminate for the convenience of the City. This could be done at any time and would not result in the same political fallout as the other modes of termination (or debarment).

On March 29, 2004, Mr. Gallagher wrote Ms. Mullins a letter stating that on March 24, 2004, the Board of Estimates had terminated the Mullins contract. Ms. Mullins asserted that when she called the Purchasing Department to discuss the termination, she was referred to Joseph Mazza, who advised her that part of the reason for her termination was her appearance on Fox 45. Mr. Mazza was an assistant to Mr. Gallagher. At trial,

Mr. Gallagher stated:

> An issue of conflict of interest had arisen and counsel in the law department researched that issue and determined that there was a conflict of interest or certainly a perception of the conflict of interest. And based upon that reason I proceeded to terminate Deborah Mullins' contract.

Mr. Gallagher also testified that he conducted no further investigation after receiving Ms. Winner's memo and that the conflict of interest was the sole reason for the termination of Ms. Mullins' contract.

About eight months after her contract with the City was terminated, Ms. Mullins filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Maryland. Zvi Guttman was appointed trustee for the Mullins bankruptcy estate.

The trial court entered judgment in favor of the City on Ms. Mullins' claim that the appellants breached her contract by firing her, after the jury found that there had been no breach. The jury found in favor of Ms. Mullins on count three, alleging a retaliatory termination of the contract in violation of the First Amendment. The jury also found, in special interrogatory number 5 of the verdict sheet, that "At the time the contract was terminated," the City had

"knowledge or grounds to terminate the contract with Plaintiff regardless of Plaintiff s protected statement on Fox 45." The court entered judgment in favor of appellee in the amount of $110,000 on September 5, 2008, and an amended judgment in the amount of $120,000 on October 8, 2008. The appellants timely appealed.

DISCUSSION

I.

The City contends that no official policy or custom of the City of Baltimore caused a retaliatory termination of Ms. Mullins' contract. The City argues that there is no evidence that it had an official policy or custom of retaliating against vendors for their protected speech. Moreover, the City argues that the Board of Estimates is the sole final policymaking authority in the termination of the City's contracts. Finally, the City argues that it is not vicariously liable under 42 U.S.C. § 1983 for the acts of its employees.

42 U.S.C. § 1983 provides a 'civil action for deprivation of rights':

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

In *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690-91 (1978), the United States Supreme Court held that municipal corporations could be sued under § 1983. The Court upheld the rule that municipalities could not be rendered liable under § 1983 based on a theory of respondeat superior. *Id.* at 692. Thus, only when a government policy inflicted the injury could a municipality be liable under § 1983. *Id.* In particular, the Court held:

> Local governing bodies . . . can be sued directly under § 1983 . . . where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover . . . local governments, by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to government custom even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690.

The appellants argue that Ms. Mullins failed to prove that the City had an illegal policy that injured her, and thus the City cannot be liable. *See Orgain v. City of Salisbury*, 521 F.Supp.2d 465, 480 (D. Md. 2007) ("[A] plaintiff's burden is two-fold: (i) to prove a constitutional violation (ii) proximately caused by an official policy or custom."); *see also Board of County Comm 'rs v. Brown*, 520 U.S. 397 (1997) (holding that it was not sufficient for respondent merely to identify conduct attributable to the county, such as the one-time decision to hire; she also had to demonstrate that through its deliberate conduct, the county was the moving force behind the injury). In *Brown*, the United States Supreme Court expanded on the meaning of "policy" and "custom" and the logic behind the requirement that one be identified before liability is imposed:

> Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. Similarly, an act performed pursuant to a "custom" that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.

Id. at 404 (citation omitted).

In *Robinson v. Balog*, 160 F.3d 1 83 (4th Cir. 1998), the Fourth Circuit held that the Mayor and City Council of Baltimore were not liable for the firing of employees in the Bureau of Solid Waste of the Baltimore Department of Public Works for constitutionally protected speech. The Court held that the District Court had properly dismissed the Mayor and City Council of Baltimore because the employees did not provide proof that their speech was the 'moving force' behind the injury alleged. *Id.* at 191 . To satisfy the 'moving force' standard, the plaintiff must prove that the "relevant municipal action -- or inaction -- was taken with deliberate indifference to a plaintiffs rights." *Id.* Noting that deliberate indifference is a "stringent standard of fault," the federal appeals court held that the record must show that the municipality disregarded a known or obvious risk of its action. *Id.*

Ms. Mullins argues that municipal liability may be imposed for a single decision by municipal policymakers. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (holding that by ordering the deputy sheriffs to enter petitioner's clinic the county prosecutor was acting as the final decisionmaker for the county); *but see Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) ("proof of a single incident of unconstitutional activity is not sufficient to impose municipal liability, unless proof of the incident includes proof that it was caused by an existing,

unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.") In *St. Louis v. Praprotnick*, 485 U.S. 112 (1988), the Supreme Court summarized the guiding principles to be used when examining whether even a single decision can constitute municipal policy:

> First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible . . . acts which the municipality has officially sanctioned or ordered. Second, only those municipal officials who have final policymaking authority may . . . subject the government to § 1983 liability. Third, whether a particular official has final policymaking authority is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.

Id. at 123.

In order for the municipality officially to sanction or order a retaliatory firing, it must be cognizant of the protected activity. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005). In *Constantine*, the Court held:

> In order to establish a causal connection

> between First Amendment action and an alleged adverse action, a plaintiff in a retaliation case must show, at the very least, that the defendant was aware of her engaging in protected activity. Knowledge alone,however, does not establish a causal connection between the protected activity and the adverse action. There also must be some degree of temporal proximity to suggest a causal connection.

Id. at 501.

Here, Ms. Mullins attempts to impute retaliatory animus to the Board of Estimates through circumstantial evidence, *i.e.,* the January 16, 2004 email from Ms. Winner to Mr. Huskey and Mr. Winfield and the February 4, 2004 memo authored by Ms. Winner.[3] The Baltimore City Charter, Article

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[3] We assume, without deciding, that the 'Board of Estimates is the final policymaking authority for this matter. *See* Baltimore City Charter, Art. VI, § 1 1 (a) ("The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter."); *see also* Baltimore City Charter, Art. VI, § 2 ("To exercise its powers and perform its duties, the Board may promulgate rules and regulations and summon before it the heads of departments, bureaus or divisions, municipal officers, and members of commissions or boards."); Baltimore City Charter, Art. VI, § (g)(1)(v) ("Any recommendation that is made by any municipal agency to the Board of Estimates as to the appropriate award to be made by the Board is advisory only and not binding on the Board.").

VI § 1, establishes the Board of Estimates, which is comprised of the Mayor, President of the City Council, Comptroller, City Solicitor, and Director of Public Works. Ms. Mullins claims that three of the members of the Board were aware of her protected speech and were "intimately involved in looking for a way to terminate the contract." She identifies them as George Winfield, the Director of Public Works, who has since passed away; Thurman W. Zollicofer, Jr., the City Solicitor; and Deputy Mayor Michael Enright.[4] In terms of the timing of these events, Mr. Charles Krysiak, Chief of Fleet Management for Baltimore City, testified that Mr. Winfield called him after the newscast to discuss it. Ms. Mullins did not present any evidence, however, to show that Mr. Zollicofer or the Mayor were aware of the protected speech prior to their decision to fire her, as the February 4 memo does not contain any mention of the protected speech.

Precedent does not support the imposition of liability through evidence that shows that only one of the five Board members was aware of the memo when the Board voted to fire Ms. Mullins. *See Gibson v. Old Town Trolley Tours*, 160 F.3d 177, 182 (4th Cir. 1998) ("In a retaliation case, knowledge is

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[4] Appellee asks us to impute the Deputy Mayor's knowledge to the Mayor.

necessary to establish causation[.]); *see also Allen v. Rumsfeld,* 273 F.Supp.2d 695, 708 (D. Md. 2003) ("Temporal proximity is insufficient to establish a causal connection when there has been no showing that defendant knew plaintiff had engaged in the protected activity"); *Ambrose v. Twp. of Robinson,* 303 F.3d 488, 493 (3rd Cir. 2002) ("[I]f the Commissioners were unaware of [plaintiff's] affidavit, it could not have possibly been a substantial or motivating factor in their decision to suspend him[.]".) Because a jury may not be allowed to infer retaliation from evidence that does no more than suggest that it is a possibility [5], *Gibson v. Old Town Trolley Tours,* 160 F.3d 177, 182 (4th Cir. 1998), we hold that Ms. Mullins' § 1983 claim against the Mayor and City Council of Baltimore must fail as a matter of law.[6]

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[5] Mrs. Mullins also failed to present evidence at trial to show that Edward Gallagher, whom she argues was a policymaker with broad discretionary powers to administer and terminate contracts awarded by the Board, was aware of the protected speech before recommending that the contract be terminated. Thus, the verdict against the City cannot be sustained on the basis of his alleged position as the final policymaker in this matter.

[6] In the absence of evidence showing that a majority of the Board members knew of the protected speech, Mrs. Mullins' claim that the Board of Estimates ratified Mr. Gallagher's retaliatory firing must also fail. *See St. Louis v. Praprotnik,* 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.").

The Supreme Court's holding in *Mt. Healthy City Sch. Dist. Bd. of Educ v. Doyle*, 429 U.S. 274, 287 (1977), also casts doubt on the jury's decision to award damages to Ms. Mullins. In *Mt. Healthy* the Supreme Court held that an employer can avoid liability if it proves that it would have made the same employment decision even in the absence of protected conduct. Where, as here, the evidence regarding the employer's true reason for firing an employee is in conflict, the question of whether the employee would have been discharged in the absence of the conduct is one for the jury. *O'Leary v. Shipley*, 313 Md.189, 204 (1988).

Here, the issue was properly submitted to the jury, but the jury interrogatories were not drafted in a manner consistent with the holding of *Mt. Healthy*. The jurors answered "Yes" to question four on the verdict sheet, which asked: "Were statements Plaintiff made on Fox 45 on January 14, 2004 and February 19, 2004 a substantial or motivating factor in Defendant's decision to terminate the contract?" The jurors, however, also answered "Yes" to question five, which asked: "At the time the contract was terminated, did Defendant have knowledge or grounds to terminate the contract with Plaintiff regardless of Plaintiff's statement on Fox 45?" This interrogatory is different from what the Supreme Court determined to be a proper query once the plaintiff has met the "substantial factor" burden, as the jury did here by answering yes to question four. In *Mt. Healthy*, the Court held that the next

step was for the lower court to determine whether the Board had shown by a preponderance of the evidence that it *would* have reached the same decision even in the absence of protected conduct. *Mt. Healthy*, 408 U.S. at 287 (emphasis added). Thus, although the jury's answer to question five undoubtedly calls into question the validity of Ms. Mullins' claim, it does not necessarily preclude liability as it would if drafted in accordance with the Court's holding in *Mt. Healthy*. Regardless, Ms. Mullins' inability to show that a majority of the members of the Board had knowledge of her speech precludes liability. Therefore, we reverse the judgment of the circuit court and remand for entry of judgment in favor of the Mayor and City Council on count III. Accordingly, we do not address the appellants' other arguments.

II.

Ms. Mullins contends that the circuit court erred when it granted summary judgment in favor of Mr. Gallagher because he is not entitled to legislative or qualified immunity. The appellants argue that Mr. Gallagher's prior dismissal is law of the case.[7] Further, they argue that Mr. Gallagher is entitled to legislative and/or qualified immunity, and that count

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[7] This issue was abandoned at oral argument. Counsel conceded that Mr. Gallagher was never dismissed before the first appeal despite this Court's statement at page 4, n. 4 of our earlier opinion.

three of Ms. Mullins' third amended complaint fails to state a claim against Mr. Gallagher.

In *Bogan v. Scott-Harris,* 523 U.S. 44, 49 (1998), the United States Supreme Court held that local legislators are absolutely immune from suit under § 1983 for their legislative activities. The Court held that absolute immunity attaches to all action taken in the sphere of legitimate legislative activity, which is to be determined by the nature of the act. *Id.* at 54-5. Officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions. *Id.* at 55. The Court held that Bogan's acts, including the introduction of a budget and signing into law an ordinance, were formally legislative, even though he was an executive official, because they constituted "integral steps in the legislative process." *Id.* Expanding on this rationale, the Court held:

> We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of

> a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city council, in eliminating DHHS, certainly governed "in a field where legislators traditionally have power to act."

Id. at 56.

Here, the appellants argue that even though Mr. Gallagher was not a member of the Board of Estimates and did not vote to terminate Ms. Mullins' contract with the City, he is entitled to legislative immunity because his preparation and submission of the resolution were integral steps in the legislative process. We do not agree. In *Bogan,* the executive official was found liable because he prepared a budget proposal which eliminated 135 city positions, including that of the plaintiff in that case. 523 U.S. at 47. Here, Mr. Gallagher merely submitted a request for action to the Board seeking to terminate Ms. Mullins' contract under the contract's termination for convenience clause.

His decision, which according to Mr. Gallagher was based on the information in Ms. Winner's memo, was not taken in the context of the City's overall budgetary plan for the fiscal year, as was the decision in *Bogan.* Furthermore, he did not recommend that a number of City positions be

eliminated in the context of budget cuts, as did the official in *Bogan*. Rather, he proposed that the Board terminate one contract only, in a move that was unrelated to the overall budgetary process.

The Board of Estimates is part of the executive branch of City government and is not a legislative body. *See* Baltimore City Charter, Art. VII, § 1(a). Even if the act of voting on Mr. Gallagher's request was procedurally legislative, the act of voting on this particular resolution was not substantively legislative because it did not involve a policy-making decision of a general scope. *See Baraka v. McGreevey,* 481 F.3d 187, 198 (3rd Cir. 2007) (holding that *Bogan's* analysis illustrates that the two-part substance/procedure inquiry provides a useful means of determining whether actions are in the sphere of legitimate legislative activity). Rather, the decision is better characterized as executive or administrative in nature. Therefore, the trial court erred in dismissing Mr. Gallagher from the case on the basis of legislative immunity. Accordingly, we shall remand the case to it to determine whether he is nevertheless liable for the termination of Ms. Mullins.[8]

In order to provide guidance to the trial court, we

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[8] We do not address the appellants' contention that Mr. Gallagher is entitled to qualified immunity because they did not raise it at the trial level. See Maryland Rule 8 131(a).

note that Mr. Gallagher was sued both in his official capacity and in his individual capacity. While the theories of liability differ[9], appellee has relied exclusively here on her contention that Mr. Gallagher is responsible for the termination of the contract as a final decision-maker. As we have indicated, *supra,* our holding that the City is not liable under § 1983 is based upon the assumption that the Board of Estimates is the final policymaking authority for this matter. *See* p. 10, n. 3. Appellee contends, however, that the contract itself vests Mr. Gallagher with the power, as City Purchasing Agent, to terminate the contract. We disagree. The Section on which Ms. Mullins relies for her assertion that Mr. Gallagher had authority to terminate the contract, Section XXIX(C.), states: "The performance of work under this contract may be terminated by the City in accordance with this clause in whole, or in part, whenever the City Purchasing Agent shall determine that such termination is in the best interest of the City." Thus, this section must be read in conjunction with the rest of the Section, including XXIX(A.), which clearly gives the Board of Estimates the right to terminate the contract "upon recommendation of the City Purchasing Agent."

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[9] Plaintiffs bringing individual capacity or personal capacity suits under § 1983 can establish personal liability by showing that the official, acting under color of state law, caused the deprivation of a federal right. Thus, the plaintiff need not establish a connection to governmental custom or policy. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Mr. Gallagher's recommendation was not binding upon the Board and thus he was not a final policymaker under *Monell*. *See* Baltimore City Charter, Art. VI, § (g)(1)(v); *see also Walker v. City of Salisbury*, 170 F.Supp.2d 541 (D. Md. 2001) (holding that supervisor in city finance department was not a final policymaker for the City even though he had the authority to make personnel decisions). To the extent that Ms. Mullins continues to argue that her § 1983 claim against Mr. Gallagher is based on the assertion that Mr. Gallagher was the final policymaker and thus ultimately responsible for the termination of Ms. Mullins' contract, her claim must fail as a matter of law.[10]

III.

Ms. Mullins contends that the circuit court abused its discretion when it denied her petition for attorney's fees. She argues that she is entitled to reasonable attorney's fees and expenses and that complete disallowance of attorney's fees was an abuse of discretion by the circuit court. She also argues that the large attorney fee request was justified because of the large amount of time spent on the case.

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[10] Our holding that Mr. Gallagher is not the final policymaker would not preclude, on collateral estoppel grounds, Ms. Mullins from constructing an argument on remand which applies the proper standards for an individual capacity suit under § 1983.

Reasonableness of fees is a factual determination within the sound discretion of the court, and will not be overturned unless clearly erroneous. *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.* , 405 Md. 435, 448 (2008). The party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request. *Myers v. Kayhoe,* 391 Md. 188, 207 (2006). In light of the fact that we have held that Ms. Mullins § 1983 claim against the City must fail as a matter of law, we do not see any reason to disturb the trial court's decision regarding fees. Any decision regarding attorney's fees in connection with Mr. Gallagher would be premature in light of our remand of the case to the trial court for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IN FAVOR OF DEBORAH MULLINS AS TO COUNT THREE OF THE THIRD AMENDED COMPLAINT IS REVERSED.

CASE REMANDED FOR ENTRY OF JUDGMENT IN FAVOR OF MAYOR AND CITY COUNCIL OF BALTIMORE ON COUNT III OF THE THIRD AMENDED COMPLAINT.

JUDGMENT VACATED AS TO EDWARD GALLAGHER ON COUNT III OF THE THIRD AMENDED COMPLAINT AND

CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID 50% BY APPELLANTS AND 50% BY APPELLEES.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I
The Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
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OCT 13 2010
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No. 10-347

In The
Supreme Court of the United States

ZVI GUTTMAN,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND & EDWARD J. GALLAGHER,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The Petition incorrectly identifies the Respondents' names. The correct names of the Respondents are the Mayor and City Council of Baltimore and Edward J. Gallagher. The legal name for the corporate entity commonly referred to as the City of Baltimore is the "Mayor and City Council of Baltimore." *See* BALTIMORE CITY CHARTER, Art. § 1 ("The inhabitants of the City of Baltimore are a corporation, by the name of the "Mayor and City Council of Baltimore," and by that name shall have perpetual succession, may sue and be sued, may purchase and hold real, personal and mixed property and dispose of the same for the benefit of the City, as herein provided, and may have and use a common seal, which may be altered at pleasure.").

Neither current Mayor Stephanie Rawlings-Blake nor her predecessors were named as defendants in this case.

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STATEMENT OF THE CASE

A. Factual Background

On December 12, 2001, while the Mayor and City Council of Baltimore ("the City") employed Deborah Mullins' husband, Jimmy Mullins, in its body shop in the City's central garage, Mrs. Mullins entered into a requirements contract with the City to perform automobile body repairs performed on City owned vehicles. The Contract, known as BP-02055, permitted vendors like Mrs. Mullins to bid for body repair work by submitting proposed repair estimates to the City's body shop where Mr. Mullins worked. During the 26 months from February 1, 2002 through April 31, 2004, the City paid Mrs. Mullins the sum of $292,087.07 for 200 repair awards.

Michael Enright, the Deputy Mayor of the City of Baltimore, asked Donald Huskey, the Deputy City Solicitor, and George Winfield, the Director of Public Works, to investigate the quality of the work performed by Mrs. Mullins, the relationship between Mrs. Mullins and a City employee (Mr. Mullins), and the possible debarment of Mrs. Mullins from City contracts. Mr. Huskey and Mr. Winfield asked Leslie Winner, Esq., an attorney in the City Law Department's Contracts Division, to conduct a preliminary investigation to address Mr. Enright's concerns. Because Mrs. Winner was unaware of the Contract, she "called around trying to gather information to find out what was going on."

WBFF-TV (Fox 45) of Baltimore broadcast statements by Mrs. Mullins as part of news stories that aired on January 14, 2004 and February 19, 2004. Mrs. Mullins' statements were included in the January 14, 2004 broadcast, which addressed the age and condition of the automobile fleet used by Baltimore Police Department detectives. During the broadcast, Ms. LaPolla, the FOX 45 reporter, erroneously stated, "And DPW workers should know. Their agency is the one responsible for keeping unmarked police cars on the road." In fact, these vehicles are neither owned nor serviced by the City or its contractors.

On January 16, 2004, Mrs. Winner advised Mr. Huskey that Mr. Winfield had briefed her about the Contract. Mr. Winfield never asked or suggested to Mrs. Winner that Mrs. Mullins' Contract be terminated. When Mrs. Winner submitted her written response to Mr. Enright on February 4, 2004, entitled "Confidential Legal Advice Memorandum," she was unaware of Mrs. Mullins' statements on television on January 14, 2004. The memorandum, therefore, included no information concerning Mrs. Mullins' statements presented during the televised report.

Mr. Winfield discussed with Charles Krysiak, the Chief of the City's Fleet Management Division, the January 14, 2004 WBFF-TV broadcast that blamed the poor condition of the detectives' vehicles on Fleet Management Division, even though it neither owns nor maintains those vehicles.

Although Mr. Edward Gallagher, the acting City purchasing agent, neither saw the January 14, 2004, newscast nor was aware of the nature or content of Mrs. Mullins' comments, Mr. Gallagher, according to Mr. Krysiak, called him after January 14, 2004 to inquire about Mrs. Mullins' performance as a vendor. Mr. Gallagher does not recall speaking with Mr. Krysiak about Mrs. Mullins. Mr. Gallagher did not receive any memoranda from Mr. Krysiak recommending Mrs. Mullins' termination. Mr. Krysiak does not know why Mr. Gallagher recommended that Mrs. Mullins' Contract be terminated. Mr. Krysiak does not know why the Board of Estimates voted to terminate the Contract.[1]

Mr. Gallagher and Mr. Winfield testified that they never discussed the termination of Mrs. Mullins' Contract. In fact, Mr. Winfield never asked or suggested to anyone that Mrs. Mullins' Contract be terminated.

Based on the information in Mrs. Winner's Legal Advice Memorandum, Mr. Gallagher recommended that the Board of Estimates terminate Mrs. Mullins' Contract with the City because "her husband worked in the City's body repair shop and that Mrs. Mullins

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[1] "The Board of Estimates is composed of the Mayor, the President of the City Council, the Comptroller, the City Solicitor and the Director of Public Works." BALTIMORE CITY CHARTER, Art. VI, § 1. The Board has the final authority to award contracts and supervise purchasing. BALT. CITY CHARTER, Art. VI, § 11(a).

was a vendor that bid on projects to repair City vehicles. And my concern was that that relationship certainly created a perception of a conflict of interest." Mrs. Winner's legal memorandum had highlighted the concern that "the chief of Central Garage must see Mr. Mullins as not purposefully or accidentally made privy to any insider information regarding the separate awards." Mr. Gallagher "did not see it as a reasonable task to impose on the management of the Central Garage that they cloister one of their employees constantly to make sure there's no information that that employee receives regarding such an open process as the bid."

Mrs. Mullins' statements about the condition of the Police Department's marked patrol car fleet were broadcast during a February 19, 2004 WBFF report concerning why police officers were involved in 548 motor vehicle accidents in 2003.

On March 10, 2004, Mr. Gallagher sent Mrs. Mullins a letter to notify her that the City's Board of Estimates intended to consider terminating her Contract under the Contract's termination for convenience clause. On March 12, 2004, Mr. Gallagher submitted a request for action to the City's Board of Estimates, placing the issue of whether to terminate Mrs. Mullins' Contract on the Board's agenda.

On March 24, 2004, the Board of Estimates approved a resolution terminating Mrs. Mullins' Contract "for convenience." On March 29, 2004, Mr. Gallagher sent Mrs. Mullins a letter notifying her of

the Board of Estimates' termination of her Contract during their March 24, 2004 meeting.

Prior to the Board of Estimates' termination of Mrs. Mullins' Contract on March 24, 2004, there is no evidence that any of the members of the Board of Estimates had knowledge that Mrs. Mullins had appeared on television on either January 14, 2004 or February 19, 2006, and made statements about City vehicle repair issues.

B. The Proceedings Below

The Petitioner, Zvi Guttman, trustee in bankruptcy for Mrs. Mullins, filed an amended complaint in the Circuit Court for Baltimore City against the Respondents, the City and Edward J. Gallagher, alleging a violation of the First Amendment to the United States Constitution. The Circuit Court dismissed the case, finding that Mrs. Mullins' speech was not entitled to constitutional protection. On October 19, 2007, the Court of Special Appeals of Maryland reversed the judgment and remanded the case, holding that Mrs. Mullins' broadcast speech was entitled to constitutional protection.

After a jury trial, the Circuit Court entered judgment in favor of the City on count one, finding no breach of the Contract. The jury found in favor of Mrs. Mullins and the trial court entered judgment in the amount of $110,000 on September 5, 2008, for count three, which alleged a retaliatory termination of the Contract in violation of the First Amendment to

the United States Constitution. The jury, however, found in special interrogatory number 5 of the verdict sheet that, "At the time the contract was terminated," the City had "knowledge or grounds to terminate the contract with Plaintiff regardless of Plaintiff's protected statement on Fox 45."

The trial court entered an amended judgment in the amount of $120,000 on October 8, 2008. The City noted an appeal on November 5, 2008, with Mrs. Mullins noting a cross-appeal on November 10, 2008. On February 2, 2010, the Court of Special Appeals reversed the judgment against the City, because Mrs. Mullins was unable to show that a majority of the members of the Board of Estimates had knowledge of her protected speech prior to voting to terminate her Contract with the City. The appellate court vacated the judgment as to Mr. Gallagher, holding that he was not a final policymaker under 42 U.S.C. § 1983 and that he was not entitled to legislative immunity. The court remanded the case for further proceedings action as to the individual capacity claim against Mr. Gallagher.

On June 11, 2010, the Court of Appeals of Maryland denied the petition for writ of certiorari filed by Mrs. Mullins and the cross-petition filed by Mr. Gallagher.

REASONS FOR DENYING THE PETITION

I. The Petitioner's Question As To The Evidentiary Burdens Of *Monell* Does Not Warrant Further Review.

A. The Question Seeking A Radical Revision Of § 1983 Jurisprudence Was Not Raised, Briefed, Argued Or Decided Below.

In her first question presented, Mrs. Mullins argues that the Court should review this case because the evidentiary burden established by *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny makes it difficult to establish municipal liability and is overly complex. Recognizing that "*Monell* liability is not a form of *respondeat superior,* but that instead, a municipality can only be held liable 'when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible for under section 1983,'" Mrs. Mullins asks this Court to scrap more than thirty years' jurisprudence. *Valentino v. Village of South Chicago Heights*, 575 F.3d 664, 674-675 (7th Cir. 2009) (quoting *Monell*, 436 U.S. at 694).

While Mrs. Mullins has asserted a claim against the City for the violation of her constitutional rights, she has not in any lower court made the argument that *Monell*'s bases for municipal liability should be fundamentally altered or that there should be

respondeat superior liability for municipalities in actions brought under 42 U.S.C. § 1983. Mrs. Mullins has not offered an alternative basis for municipal liability. These issues simply have not been raised, briefed, argued or decided below.

Instead, Mrs. Mullins' claim has been pursued in the Maryland trial and appellate courts within the well-established parameters of *Monell*. A fundamental reinterpretation of § 1983 and its application to municipalities, after its application in thousands of cases in virtually every court in the country, should not be undertaken as an afterthought in a case in which the issue has not been raised or considered. Therefore, Mrs. Mullins' first question presented is not properly raised at this time and the Court should not grant further review for its consideration.

B. The Law And Facts Of This Case Do Not Warrant The Consideration Of The *Monell* Question.

Even if the question is properly presented, the factual and legal milieu of the present case does not support the proper consideration of Mrs. Mullins' question. Mrs. Mullins alleges that she suffered adverse action in retaliation for her protected speech. For the City to be liable under *respondeat superior*, there must be evidence that a City employee or agent took the improper retaliatory action while acting within the scope of employment. *See, e.g., Sherrod v. Palm Beach County School Dist.*, 424 F.Supp.2d 1341,

1344 (S.D.Fla. 2006) ("[T]he doctrine of *respondeat superior*, the tort principle which holds an employer liable for the acts of an employee committed in the course and scope of the employment, does not apply in the § 1983 context.").

1. The City's Board of Estimates Was The Entity That Terminated Mrs. Mullins' Contract.

To impose *respondeat superior* liability on the City, the actor whose wrongful actions are to be attributed to the City must be identified. That actor was the City's Board of Estimates. "The Board of Estimates is composed of the Mayor, the President of the City Council, the Comptroller, the City Solicitor and the Director of Public Works." BALTIMORE CITY CHARTER (1996 ED.), Art. VI, § 1. The Board of Estimates is the entity within the City's government that has the final authority over the awarding, supervision and termination of the City's contracts. BALT. CITY CHARTER, Art. VI, § 11(a). ("The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter.").

The adverse action in this case was the termination of Mrs. Mullins' Contract with the City. Paragraph XXIX.A of the Contract provides, in part, "Upon recommendation of the City Purchasing Agent, the Board of Estimates reserves the right to terminate any contract . . . "

Paragraph XXIX.C of the Contract provides, in part, "The performance of work under this contract may be terminated by the City in accordance with this clause in whole, or in part, whenever the City Purchasing Agent shall determine that such termination is in the best interests of the City." Thus, in the Contract, the Board of Estimates explicitly retained its power to terminate the Contract, even if the action was taken on the recommendation of the purchasing agent.

As a matter of state law, whatever authority was provided to the City's purchasing agent in the Contract, it could not diminish the Board of Estimate's role as the final authority in awarding contracts and supervising all purchasing by the City. *See Tuxedo Cheverly Vol. Fire Co. v. Prince George's County*, 39 Md. App. 322, 330 (1978) (If the municipality's charter provisions are not precisely followed during the contracting process, the contract is *ultra vires*, or outside the power of the municipal corporation to make, and void *ab initio*.).

Similarly, any delegation by the Board of Estimates of its authority to terminate Mrs. Mullins' Contract would have been unenforceable as *ultra vires*. *See Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 161 (1999) ("The City has no right under the law to delegate its governing power to any agency. The power of the City is prescribed in its charter, and the City Charter constitutes the measure of power that is possessed by any of its officials. To delegate such power to an independent agency would

be a serious violation of the law."). There was no attempted delegation in this case, but any such attempt would have been illegal and void.

Mr. Gallagher's recommendation to the Board of Estimates that it terminate Mrs. Mullins' Contract could not preempt or usurp the Board of Estimates' authority to terminate the Contract. *See Gontrum v. Mayor and City Council of Baltimore*, 182 Md. 370, 375-376 (1943) ("The effect of the acts of an officer of a municipal corporation . . . is a matter of . . . public law."). The City's Charter specifically provides that any recommendation as to the appropriate decision to be made by the Board of Estimates "is advisory only and not binding on the Board." BALTIMORE CITY CHARTER, Art. VI, § 11(g)(1)(v). Thus, as a matter of law, Mr. Gallagher's recommendation to the Board of Estimates to terminate Mrs. Mullins' Contract was "advisory only." Only the Board of Estimates took adverse action against Mrs. Mullins. Therefore, any possible *respondeat superior* liability of the City would have to be based on the Board's action.

2. There Is No Evidence Of Wrongdoing By The Board Of Estimates, For Which The City Could Be Liable Under *Respondeat Superior*.

There is no evidence to establish that the Board's action was unlawful. Among other things, Mrs. Mullins had the burden of proving that her protected speech was a "motivating factor" in the Board of

Estimates' decision to terminate her Contract. *Gasper v. Ruffin Hotel*, 183 Md. App. 211, 222 (2008). To do this, Mrs. Mullins had to establish that the Board of Estimates acted with actual knowledge of her protected speech. *See Chappell v. Southern Maryland Hosp., Inc.*, 320 Md. 483, 497 (1990) ("In order to establish a *prima facie* case of retaliatory action . . . a plaintiff must demonstrate that the employer was aware of plaintiff's participation in protected activity . . . "); *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007) ("The first thing [plaintiff] must be able to prove, therefore, is [defendant's] knowledge that he engaged in a protected activity."); *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 501 (4th Cir. 2005) ("a plaintiff in a retaliation case must show, at the very least, that the defendant was aware of her engaging in protected activity"); *Hooven-Lewis v. Caldera*, 249 F.3d 259, 278 (4th Cir. 2001) ("Without knowledge of the protected disclosure, the disclosure could not have been the cause of the alleged reprisals."); *Dowe v. Total Action against Poverty*, 145 F.3d 653, 657 (4th Cir. 1998) ("Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case."). *See also O'Conner v. Chicago Transit Auth.*, 985 F.2d 1362, 1370 (7th Cir. 1993) ("Allegedly protected speech cannot be proven to motivate retaliation if there is no evidence that the defendants knew of the protected speech."); *Schlarp v. Dern*, 610 F.Supp.2d

450, 470 (W.D.Pa. 2009) (plaintiff alleging First Amendment retaliation "bears the burden of producing *some evidence* that the relevant decision makers knew – at the time the decision was made – about his testimony before the Ethics Commission, his filing of formal grievances, and his refusal to sign the letter to the federal district judge"); *McFarland v. George Washington University*, 935 A.2d 337, 357 (D.C.App. 2007) ("[I]n order to establish the element of causation in a *retaliation* claim, an employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity.").

3. There Is No Evidence That The Members Of The Board Of Estimates Had Knowledge Of Mrs. Mullins' Speech.

The members of the Board of Estimates who voted to terminate Mrs. Mullins' Contract with the City were: Honorable Martin O'Malley, Mayor; Honorable Sheila Dixon, President of the City Council; Honorable Joan I. Pratt, Comptroller; City Solicitor Thurman Zollicoffer and Public Works Director George Winfield. Mrs. Mullins did not offer any direct evidence at trial concerning the knowledge of Mayor O'Malley, City Council President Dixon, Comptroller Pratt and Solicitor Zollicoffer of Mrs. Mullins' protected speech when they voted on the resolution

terminating the Contract.[2] Without evidence that these four members of the Board of Estimates had

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[2] Mrs. Mullins did not offer positive evidence that Mr. Winfield knew of her protected speech, relying instead on perceived inconsistencies between his deposition testimony and Mrs. Winner's notes and legal memorandum. Mr. Winfield's failure to recall that he spoke to Mrs. Winner about the automobile body repair Contract and that he spoke to a subordinate about the January 14, 2004, Fox news story in which the subordinate had appeared is insufficient to show that Mr. Winfield had actual knowledge of Mrs. Mullins' protected speech. *See Campion v. City of Springfield*, 559 F.3d 765, 770 (7th Cir. 2009) ("contradictions" in aldermen's testimony "about his knowledge of" the contractor's activities and "about their reasons for replacing" the contractor failed to show that the contractor's "protected activity was a motivating factor for the City Council's decision to" terminate the contractor).

Mr. Winfield saw the newscasts featuring Mrs. Mullins' protected statements for the first time two weeks prior to his deposition taken on July 28, 2005. *See Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1156 (11th Cir. 2002) ("[N]either a court nor a jury may impute knowledge to a decision-maker who has sworn he had no actual knowledge.").

Even if, as Mrs. Mullins claims, Mr. Winfield operated under an illegal retaliatory motivation, his single vote on the Board of Estimates could not suffice to render the action of the entire Board unlawful. *See Wragg v. Village of Thornton*, 604 F.3d 464, 469 (7th Cir. 2010) ("[T]here can be no municipal liability for the isolated acts of only one member of a multi-member board."). Under § 1983, a plaintiff cannot impose liability on a governmental entity based on evidence of the pretextual motivation of one of its members. *See Campion*, 559 F.3d at 770 (one alderman's unlawful retaliatory motivation cannot be imputed to the others); *La Verdure v. County of Montgomery*, 324 F.3d 123, 125 (3rd Cir. 2003) (no municipal liability because board voted unanimously and only one member had improper motive); *Matthews v. Columbia County*, 294 F.3d

(Continued on following page)

actual knowledge of her protected speech, Mrs. Mullins could not prevail on her retaliation claim. *See Baqir v. Principi*, 434 F.3d 733, 748 (4th Cir. 2006) (No retaliatory motive shown where evidence failed to show that the relevant officials were aware of plaintiff's contact with the EEO Counselor or his filing of an administrative complaint at the time the alleged retaliation occurred.); *Campion v. City of Springfield*, 559 F.3d 765, 770 (7th Cir. 2009) (rejecting the plaintiff's First Amendment retaliation claim, finding that there was no evidence showing that all of the aldermen and the Mayor who had voted to terminate the city's contract with an independent contractor actually knew that the plaintiff was a member of organization holding socially conservative views); *Patton v. Indianapolis Public School Board,* 276 F.3d 334, 340 (7th Cir. 2002) (defendant granted summary judgment where plaintiff produced no evidence that defendant knew of protected speech); *Beattie v. Madison County School Dist.,* 254 F.3d 595, 604 (5th Cir.

1294, 1297 (11th Cir. 2002) (The existence of an unconstitutional motivation by only one commissioner is insufficient to impute such a motive to the commission at large.); *Jeffries v. Harleston*, 52 F.3d 9, 14 (2nd Cir. 1995) ("[T]he nine votes based on legitimate grounds constitute a superseding cause breaking the causal chain between the tainted motives . . . and the decision"); *Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1239 (9th Cir. 1994) (no municipal liability because board acted unanimously and only one member had improper motive); *see, e.g., Dixon v. Burke County, Ga.*, 303 F.3d 1271, 1276 (11th Cir. 2002) ("no municipal liability can attach for one tainted vote out of twelve cast").

2001) (finding that without "actual knowledge" of the plaintiff's protected activities, the board and school district could not be liable); *Orenge v. Veneman*, 218 F.Supp.2d 758, 766 (D.Md. 2002) ("Because Plaintiff has failed to show that [supervisor] had knowledge of Plaintiff's protected EEO activity when he denied her promotion request, she fails to establish a causal connection.").

4. Imputed Or Constructive Knowledge Of Protected Speech Is Not Sufficient To Prove Retaliation.

In light of the lack of any evidence that a majority of the members of the Board of Estimates had actual knowledge of Mrs. Mullins' protected speech, she argues that knowledge of her speech can be imputed to Mayor O'Malley through his deputy, Michael Enright, and to City Solicitor Zollicoffer, through his deputy, Donald Huskey.[3]

Neither imputed nor constructive knowledge of Mrs. Mullins' protected speech is sufficient to prove that the City's Board of Estimates retaliated against her for that speech. Knowledge of Mrs. Mullins' protected speech cannot be imputed to the members of the Board of Estimates. *See Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1235 (11th Cir. 2010) ("Furthermore,

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[3] Mrs. Mullins has not asserted that either City Council President Dixon or Comptroller Pratt had actual or imputed knowledge of Mrs. Mullins' protected speech.

knowledge on the part of persons other than a decision maker cannot be imputed from other supervisors to the decision maker . . . "); *see also Olson v. GE Astrospace,* 101 F.3d 947, 954 (3rd Cir. 1996) (knowledge of one party cannot be imputed to another who is making the decision). "Constructive knowledge is not enough; the employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity." *Furline v. Morrison*, 953 A.2d 344, 355 (D.C.App. 2008).

Even though the members of the Board of Estimates did not have any knowledge of Mrs. Mullins' protected speech, Mrs. Mullins attempts to impute knowledge of her protected speech to Board of Estimates members Mayor O'Malley and Solicitor Zollicoffer based on the inferred knowledge of Mr. Enright and Mr. Huskey. Mrs. Mullins seeks to impute an inference of knowledge, which is impermissible speculation. *See Schlarp v. Dern*, 610 F.Supp.2d 450, 472 (W.D.Pa. 2009) (rejecting attempt to impute knowledge to final decisionmakers and finding "an inferred fact may not be used as a basis for a further inference, thereby extending a chain of inferences into the realm of pure conjecture").

The "knowledge" supposedly possessed by Mr. Enright and Mr. Huskey was based on the contents of the legal memorandum written by Leslie Winner. However, that memorandum did not contain any information about the protected speech because: (1) the memorandum predated the February 19, 2004

broadcast and (2) Mrs. Winner herself was unaware of Mrs. Mullins' speech broadcast on January 14, 2004. Neither Mr. Enright nor Mr. Huskey could have acquired knowledge of Mrs. Mullins' January 14, 2004, speech from Mrs. Winner's legal memorandum. Thus, there is no evidence that either Mr. Enright or Mr. Huskey had any knowledge that could be imputed to their superiors. Accordingly, even if constructive or imputed knowledge of subordinates were a sufficient basis for municipal liability, there was, in reality, no evidence of knowledge that could be imputed to the members of the Board of Estimates. Under current law, even if Messrs. Enright and Huskey had actual knowledge of the protected speech, their knowledge alone would be insufficient to prove that the Board of Estimates terminated the Mullins Contract in retaliation for Mrs. Mullins' protected speech.

In the absence of evidence that the members of the Board of Estimates, or at least a majority of the members of the Board, knew of Mrs. Mullins' protected speech, the evidence is insufficient to establish that the termination of the Contract was retaliatory. Thus, there was no unlawful retaliation for which the City could be held liable under *respondeat superior*. Therefore, the law and the facts of this case do not warrant a reconsideration of *Monell*'s requirements for municipal liability.

II. There Was Insufficient Evidence To Support Municipal Liability.

Mrs. Mullins' second question concerns her attempt to prove that the members of the Board of Estimates had actual knowledge of her protected speech, by imputing to them the supposed knowledge of their subordinates. It is clear from the cases cited above that the causal connection between protected conduct and adverse action must be established by evidence that the person or entity taking the action was at least aware of the conduct.

It is also clear from the facts of this case that the Board members' subordinates who read Leslie Winner's memorandum, which contained no information about the protected speech, could not have acquired knowledge of the speech from the memorandum. Moreover, there was no evidence that they were aware of the speech through any other means. Therefore, even if imputed or constructive knowledge were permissible to prove causation, which they are not, there was no knowledge on the part of the subordinates that could be imputed to the members of the Board of Estimates.

The Court of Special Appeals of Maryland resolved Mrs. Mullins' question correctly. There is no need for this Court to devote its time and energies to the consideration of an issue that is precluded by the facts of the case.

III. As A Matter Of Law, Mr. Gallagher Was Not A Final Policymaker And Did Not Terminate The Contract.

Mrs. Mullins also asks that the Court consider the question whether Mr. Gallagher, the City's acting purchasing agent, was a final policymaker and was in fact the person who terminated the Contract. As has been made clear in Argument I.B.1 above, Mr. Gallagher did not have the authority to terminate the Contract; the Board of Estimates was the entity that actually terminated the Contract.

Under the state law set forth above, and therefore, under federal law, only the Board of Estimates had the power to terminate the Contract and it was the sole policymaker with respect to contracts and purchasing. The Board was powerless to delegate its authority to Mr. Gallagher and, in fact, the Board explicitly retained its authority in the Contract. As a matter of law, then, Mr. Gallagher could not be a final policymaker with respect to terminating the Contract.

Aside from any consideration of who possessed authority to terminate the Contract, the fact is that the termination was actually accomplished by a resolution of the Board of Estimates. Even if Mr. Gallagher had had the power to terminate the Contract, he did not exercise that power, but deferred to the ultimate authority of the Board of Estimates.

The decision of the Court of Special Appeals was correct as a matter of law and the facts support that

decision. There is no reason for this Court to re-analyze the very clear Maryland law as to the powers of the Board of Estimates and the inability of that body to delegate its authority to any other entity.

IV. The Issue Of Attorney Fees Does Not Warrant Further Review.

Mrs. Mullins has requested that the Court review the denial of her petition for attorney fees. However, she has not presented any reason for review by this Court. Because it is clear that Mrs. Mullins failed to present evidence sufficient to support her claims against the City, there was no reason for the Court of Special Appeals to disturb the trial court's decision. And as the Maryland appellate court correctly noted, because the case has not been resolved as to the claim against Mr. Gallagher, a ruling on attorney fees as to that claim is premature. The Court should not grant review to consider the denial of attorney fees.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that the Court deny the petition.

Respectfully submitted,

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